

2007 Montana LegislatureAbout Bill -- Links**SENATE BILL NO. 345 -- WITH DRAFT AMENDMENTS****INTRODUCED BY B. HAWKS**

A BILL FOR AN ACT ENTITLED: "AN ACT PROVIDING SETBACK REQUIREMENTS FOR CERTAIN STREAMS; REQUIRING POLITICAL SUBDIVISIONS TO ESTABLISH SETBACK REGULATIONS; AUTHORIZING POLITICAL SUBDIVISIONS TO ISSUE VARIANCES AND COLLECT FEES; AUTHORIZING POLITICAL SUBDIVISIONS TO ADOPT LOCAL REGULATIONS IN LIEU OF STATE STANDARDS THAT MEET CERTAIN REQUIREMENTS; PROVIDING FOR ENFORCEMENT AND PENALTIES; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. **Section 1. Short title.** [Sections 1 through 10] may be cited as the "Montana Stream Legacy Act".

NEW SECTION. **Section 2. Intent, findings, and policy.** (1) The legislature, mindful of its constitutional obligations under Article II, section 3, and Article IX of the Montana constitution, has enacted the Montana Stream Legacy Act. It is the legislature's intent that the requirements of [sections 1 through 10] provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

(2) The legislature finds that:

(a) impacts of development on Montana's rivers and streams, including increased downstream erosion and diminished water quality, are often manifested across local government jurisdictional boundaries;

(b) the state has a duty and legitimate interest in protecting the integrity of its rivers and streams on behalf of all its citizens;

(c) the state has a duty and legitimate interest in protecting people and private property by reducing property loss from flooding and erosion;

(d) maintenance of the integrity of rivers and streams is crucial to the quality and quantity of water available to Montanans for domestic, agricultural, industrial, and recreational use;

(e) rivers and streams are highly susceptible to impacts from land development;

(f) fish and wildlife that rely on rivers and streams for habitat belong to all Montanans;

(g) development practices on lands adjacent to rivers and streams in many cases are causing excessive and unnecessary damage to the banks, beds, and protective vegetation of the state's rivers and streams; and

(h) through careful management of the lands adjacent to rivers and streams, property owners and developers can achieve their goals without sacrificing water quality or impairing the beneficial uses of the water.

(3) The legislature recognizes that Montana's rivers and streams provide important natural resources that belong to the people of the state and that support the economy, the environment,

1 and the quality of life that Montanans enjoy. It is the policy of the state to ensure that
2 development along rivers and streams proceeds in a way that:

- 3 (a) protects property from flooding and erosion;
- 4 (b) protects water quality and quantity;
- 5 (c) provides opportunities for recreation;
- 6 (d) protects valuable water recharge areas;
- 7 (e) preserves fish and wildlife habitat; and
- 8 (f) preserves the use and enjoyment of private property.

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11 **NEW SECTION. Section 3. Definitions.** When used in [sections 1 through 10], unless a
12 different meaning clearly appears from the context, the following definitions apply:

① 13 (1) "Channel migration zone" means the area where it is reasonably foreseeable that an active
14 channel of the stream could migrate in the next 100 years because of erosion or avulsion.

② 15 (2) "Flood prone areas" mean those areas adjacent to a stream that are predicted to be covered
16 by the floodwater of a flood of one hundred year frequency, based on an analysis of elevation
17 only, without taking into account channel restrictions such as bridge abutments and
18 obstructions."Flood plain" has the meaning provided in 76-5-103.

③ 19 (23) "Ordinary high-water mark" has the meaning provided in 23-2-301.

20 (4) "Person" means an individual, firm, partnership, company, commercial entity,
21 corporation, or association.

22 (35) "Political subdivision" means any incorporated city or town, a consolidated government,
23 or a county.

24 (46) "Setback" means an area of varying width adjacent to a stream where certain uses have
25 the potential to significantly affect private property, wildlife habitat, water quality, fish, or other
26 aquatic resources. Setbacks may not be smaller than the vegetative buffer.

④ 27 (57) "Tier I streams" includes the following streams as defined by the United States
28 geological survey, excluding lakes and reservoirs. A tier I stream begins where a U.S. geological
29 survey map shows its point of origin and ends where it connects to another tier I stream (or other
30 water body) or the stream leaves the state. The term includes only the mainstem of the stream,
31 and not the upstream forks or tributaries of the stream.

- 32 (a) Beaverhead River;
- 33 (b) Big Hole River;
- 34 (c) Bighorn River;
- 35 (d) Bitterroot River;
- 36 (e) Bitterroot River, West Fork;
- 37 (f) Blackfoot River;
- 38 (g) Boulder River as it flows through Jefferson County;
- 39 (h) Boulder River as it flows through Park and Sweet Grass Counties;
- 40 (i) Clark Fork River;
- 41 (j) Clark's Fork of the Yellowstone River;
- 42 (k) Clearwater River;
- 43 (l) Dearborn River;
- 44 (m) East Gallatin River;
- 45 (n) Flathead River;
- 46 (o) Flathead River, Middle Fork;

- (p) Flathead River, North Fork;
- (q) Flathead River, South Fork;
- (r) Gallatin River;
- (s) Jefferson River;
- (t) Jocko River;
- (u) Judith River;
- (v) Kootenai River;
- (w) Little Blackfoot River;
- (x) Madison River;
- (y) Marias River;
- (z) Milk River;
- (aa) Missouri River;
- (bb) Musselshell River;
- (cc) Poplar River;
- (dd) Powder River;
- (ee) Red Rock River;
- (ff) Rock Creek as it flows through Missoula and Granite Counties;
- (gg) Rock Creek as it flows through Carbon County;
- (hh) Ruby River;
- (ii) Shields River;
- (jj) Smith River;
- (kk) Stillwater River as it flows through Park and Stillwater Counties;
- (ll) Stillwater River as it flows through Lincoln and Flathead Counties;
- (mm) Stillwater River, West Fork, as it flows through Sweet Grass and Stillwater Counties;
- (nn) Sun River;
- (oo) Swan River;
- (pp) Teton River;
- (qq) Thompson River;
- (rr) Tongue River;
- (ss) Whitefish River;
- (tt) Yaak River; and
- (uu) Yellowstone River.

(5) (68) "Tier II streams" means perennial streams as defined by the United States geological survey, excluding lakes and reservoirs, that are perennial, direct tributaries of tier I streams, and that drain an area 25 square miles or greater. A tier II stream begins where a U.S. geological survey map shows its point of origin and ends where it connects to a tier I stream. The term includes only the mainstem of the stream, and not the upstream forks or tributaries of the stream.

(6) (79) "Vegetative buffer" means the portion of the setback closest to the stream where existing native vegetation is to be maintained to the greatest extent possible or enhanced. Weed control is permitted within the vegetative buffer that is designated to remain undisturbed.

NEW SECTION. Section 4. Setback regulation jurisdiction. (1) With the exception of [section 9], the provisions of [sections 1 through 10] do not apply to:

- (a) incorporated cities and towns;

(b) unincorporated entities established prior to [the effective date of this act] that are classified as census-designated places by the United States bureau of the census; and are within the boundary of a metropolitan sanitary sewer district created pursuant to 7-13-111 Chapter 7, Parts 1, 22, 23, 30, and 43; and or are served by that metropolitan sanitary sewer district;

(c) zoned areas with regulations established on or before [the effective date of this act] that have residential densities of at least 1 unit per acre and are served by municipal sewer and water systems; or

(d) tier I streams or tier II streams regulated by local setback regulations adopted prior to [the effective date of this act] that prohibit all new building construction within 150 feet of streams.

(2) Changes after [the effective date of this act] to local setback regulations adopted prior to [the effective date of this act] must comply with [sections 1 through 10].

NEW SECTION. Section 5. Requirements for setbacks and vegetative buffers. (1) Along either side of a tier I stream, there must be a setback of at least 250 feet, as measured from the ordinary high-water mark, that must include a vegetative buffer of at least 100 feet.

(2) Along either side of a tier II stream, there must be a setback of at least 150 feet, as measured from the ordinary high-water mark, that must include a vegetative buffer of at least 50 feet.

~~(3) Within vegetative buffers, native vegetation must be maintained or enhanced, although weed control is permitted.~~

~~(3) When a slope adjacent to the stream rises at least 1 foot vertically for each 2 feet horizontally for at least 20 feet above the ordinary high water mark and there is no historic evidence of bank erosion, the setbacks shall be as follows:~~

~~i. tier I streams will have a minimum setback of 150 feet, with a vegetative buffer of at least 75 feet; and~~

~~ii. tier II streams will have a minimum setback of 75 feet, with a vegetative buffer of at least 50 feet.~~

NEW SECTION. Section 6. Uses within setback -- authorization. (1) Except as provided in [section 8], the following uses are prohibited within setbacks:

(a) any type of new building, including new residential, commercial, or industrial structures, or outbuildings such as a garage or shop;

(b) the installation of a manufactured or prefabricated building;

(c) new ~~septic tanks and septic tank drain fields~~ onsite wastewater disposal facilities;

(d) an addition to an existing building of more than 50% of the square footage of the existing structure; or

(e) the construction of a new parking lot or road except when necessary to cross a river or stream.

(2) The following uses are authorized in a setback:

(a) the lawful use of land or buildings that existed on or before [the effective date of this act]; including: (i) the reconstruction, replacement, or repair of any existing onsite wastewater disposal facilities ~~septic tank or septic tank drain field~~ provided it is no closer to the stream; and

(ii) the reconstruction or repair of any building destroyed or damaged by accidental causes other than flooding, provided that (a) the original footprint of the building is not exceeded; and (b) reconstruction or repair is commenced ~~completed~~ within two years of the date of destruction.

(b) any use conducted on property ~~subject pursuant to~~ a hydroelectric project license issued by the federal energy regulatory commission or ~~otherwise located~~ within the licensed project boundary as determined by the federal energy regulatory commission;

(c) agricultural uses, except any use that includes a new building serviced by electricity, water, and sewer onsite wastewater disposal facilities and that could be used as a permanent residence;

(d) structures and equipment used to collect and transport water from a river or stream for agricultural or industrial uses, including diversion and intake structures, pipes, pumps and pumphouses, and related equipment; ~~and~~

(e) structures and infrastructure related to water-related recreation such as docks, boat ramps, and fishing access sites;

(f) limited filling for highway, street, and railroad embankments not associated with stream crossings if:

(i) reasonable alternative transportation routes outside the setback are not available; and

(ii) any encroachment is located as far from the stream channel as possible; and

(fg) repair and improvement of existing roads within the setback-; and

(h) commercial forest practices subject to the provisions of Title 77, Chapter 5, Part 3.

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NEW SECTION. Section 7. Political subdivision administration -- requirements -- fees.

(1) Before January 1, ~~2008~~, any political subdivision that has tier I streams or tier II streams within its boundaries and is subject to [section 4] must implement a permit or certification program for new construction to ensure that the requirements of [sections 1 through 10] are met.

(2) A political subdivision may charge a fee to cover the costs of implementing the requirements of [sections 1 through 10].

NEW SECTION. Section 8. Variances. (1) A political subdivision ~~may~~ must adopt variance procedures that address the ~~establish~~ criteria established [in subsection (3)] for granting variances for uses that otherwise would not be allowed pursuant to [section 6].

(2) An application for a variance must include information that the political subdivision considers necessary to evaluate the variance request, including but not limited to ~~a scientific flood plain analysis~~ a delineation of the flood plain on the parcel, plans, maps, and specifications detailing the request.

(3) ~~In evaluating a variance request, the~~ A political subdivision shall consider whether the may grant a variance is upon making the following findings that:

(a) ~~contrary to the public interest;~~

~~(b) necessary to prevent a~~ literal application of [this act] would result in an unnecessary hardship to the property owner as a result of circumstances unique to the parcel such as size, shape, topography, or location and will comply with the purpose of [sections 1 through 10];

~~(eb) as small as reasonably possible so that the intent of [section 2] is attained to the greatest degree possible;~~ the variance is not contrary to the public interest, based on a consideration of whether the variance is:

(di) likely to adversely impact water quality;

(eii) likely to increase stream bank erosion;

(fiii) likely to increase flood heights or velocity; and

(iv) consistent with the general purpose and intent of [sections 1 through 10].

(c) the hardship is not the result of the actions of the applicant; and

(d) the variance is as small as reasonably possible to accommodate the proposed use while preserving the intent of [section 2] to the greatest degree practicable.

(4) The applicant for a variance has the burden of demonstrating the factors set forth in [subsection 3] ~~presenting a preponderance of evidence to establish that the criteria for granting a variance are met.~~

(5) If the provisions of this act entirely preclude the construction of structures on an otherwise developable parcel in existence on [the effective date of this act] then:

(a) the political subdivision shall find that an unnecessary hardship exists under [subsection 3(a)]; and

(b) upon the applicant's compliance with [subsection 2], the political subdivision shall issue a variance in conformance with [subsection (3)(d)].

NEW SECTION. Section 9. Local setback standards in lieu of state standards. (1) A political subdivision may enact local setback standards ~~regulations~~ defining the setback area and vegetative buffers for in lieu of state standards that comply with the policy established in [section 2(3)]. ~~The provisions of [section 5] do not apply to tier I streams and tier II streams subject to the provisions of the local setback standards within its jurisdiction. Such regulations shall apply in lieu of the provisions of [section 5], provided they meet the minimum requirements set forth in this section.~~

(2) Locally-established setbacks may be of a fixed or variable width, and may be larger or smaller than those set forth in [section 5]. Setbacks may be expressed as a numerical distance in feet, or by narrative reference to topography or other physical features, provided they establish a definable setback.

(3) Setbacks must be established at a sufficient width, based on peer-reviewed science and local information, to fulfill the purposes set forth in [section 2] by designating an area along tier I and tier II streams where the uses prohibited in [section 6] will not occur. The setback areas should generally encompass the areas described in [(a) through (d) of this subsection]. Setbacks need not be set at a width that encompasses the entirety of these areas at every point along the stream, so long as their width is reasonably calculated to encompass these areas in most cases: Local setback standards adopted pursuant to this section must:

— (a) apply to the entire length of the stream within the jurisdiction of the political subdivision;

— (b) include setbacks based on peer-reviewed science and local conditions that ensure that the prohibited uses in [section 6] do not occur within at least three of the following areas:

(ia) wetlands adjacent to streams;

(iib) flood-prone areas a 100-year flood plain as determined by either the federal emergency management agency or the department of natural resources and conservation or, in the absence of a designation, a flood plan analysis adopted by a political subdivision;

(iic) the channel migration zone areas where it is reasonably possible that an active channel of the stream could migrate in the next 100 years because of erosion or avulsion; or and

(ivd) areas adjacent to the stream with slopes greater than 25 percent. of steep slopes adjacent to the stream or its flood plain;

1 (4) Local setback regulations must establish ~~include~~ vegetative buffers that, based on peer-
2 reviewed science and local conditions, are of sufficient width to prevent unnatural rates of
3 erosion and sedimentation, protect water quality, and maintain native riparian vegetation.

4 (5) The political subdivision shall prepare a written record in support of its decision to enact
5 a local setback regulation, including references to the peer-reviewed science and information that
6 were used to determine the width of setbacks and vegetative buffers. The numerical distances set
7 forth in [section 5] shall not be used as presumptive maximum or minimum widths for local
8 setbacks or vegetative buffers.

9 (7) Nothing in [sections 1-10] shall be construed to limit a political subdivision's authority
10 to enact regulations further limiting uses within setbacks or vegetative buffers, or to enact
11 regulations establishing setbacks and vegetative buffers for watercourses not governed by the
12 provisions of [this act].

13 ~~(3) A political subdivision may adopt local setback standards for any perennial, intermittent, or~~
14 ~~ephemeral streams within its jurisdiction.~~

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17 **NEW SECTION. Section 10. Enforcement -- penalties.** (1) The proper authorities of the
18 political subdivision, in addition to other remedies, may institute any appropriate action or
19 proceeding to ensure that a person who commences a prohibited use after January 1, 2008,
20 without certification by a political subdivision or a variance shall restore the ~~waterside~~
21 ~~management corridor~~ setbacks and vegetative buffer to its original condition before the person
22 disturbed it.

23 (2) The political subdivision may appoint enforcing officers to supervise and enforce the
24 provisions of [sections 1 through 10].

25 (3) A knowing violation of [sections 1 through 10] or any regulation adopted pursuant to
26 [sections 1 through 10] is a misdemeanor punishable by a fine not to exceed \$500 a day.
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29 **NEW SECTION. Section 11. Notification to tribal governments.** The secretary of state
30 shall send a copy of [this act] to each tribal government located on the seven Montana
31 reservations and to the Little Shell Chippewa tribe.
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34 **NEW SECTION. Section 12. Codification instruction.** [Sections 1 through 10] are
35 intended to be codified as an integral part of Title 76, and the provisions of Title 76 apply to
36 [sections 1 through 10].
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39 **NEW SECTION. Section 13. Saving clause.** [This act] does not affect rights and duties that
40 matured, penalties that were incurred, or proceedings that were begun before [the effective date
41 of this act].
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44 **NEW SECTION. Section 14. Severability.** If a part of [this act] is invalid, all valid parts
45 that are severable from the invalid part remain in effect. If a part of [this act] is invalid in one or

1 more of its applications, the part remains in effect in all valid applications that are severable from
2 the invalid applications.
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5 NEW SECTION. **Section 15. Effective date.** [This act] is effective on passage and
6 approval.
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